Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

October Term, 1995

MAURIZIO DE LUCA,

Petitioner

v.

THE UNITED NATIONS ORGANIZATION, JAVER PEREZ de CUELLAR, LUIS MARIA GOMEZ, ARMANDO DUQUE, KOFI ANNAN, ABDOU CISS, OLEG BUGAEV, SUSAN R. MILLS, FREDERICK GAZZOLI,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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112 pp

QUESTIONS PRESENTED

1. DID THE COURTS BY NOT CONSIDERING PUBLIC LAW 80-357, "THE AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES OF AMERICA," DEPRIVE THE PLAINTIFF, AS A CITIZEN OF THE UNITED STATES, A RIGHT SECURED BY THE CONSTITUTION WHEN DISMISSING THE COMPLAINT?

2. DID THE COURTS MISAPPLY PRINCIPLES OF QUALIFIED IMMUNITY IN CONCLUDING THAT DEFENDANTS, AS ADMINISTRATORS, HAVE IMMUNITIES FROM VIOLATING ESTABLISHED REGULATIONS OF THE UNITED NATIONS THAT DEPRIVED THE PLAINTIFF A RIGHT SECURED BY THE CONSTITUTION AND CAUSED HIM GRIEVOUS LOSS AND FORESEEABLE HARM?

3. WAS THE UNITED STATES GOVERNMENT (STATE DEPARTMENT) PREJUDICIAL AS "AMICUS CURIAE" IN THIS ACTION WHEN IT AVAILED TO THE LOWER

COURTS THAT IT HAD JOINED THE UNITED NATIONS IN DISMISSING THE COMPLAINT? THEREBY, DEPRIVING THE PLAINTIFF, AS A CITIZEN OF THE UNITED STATES, CONSTITUTIONAL RIGHTS OF DUE PROCESS?

PARTIES TO THE PROCEEDINGS

The only parties to this case are those named in its caption: Maurizio De Luca and United Nations Organization, et al.

THE CONSTITUTIONALITY OF AN ACT OF CONGRESS IS DRAWN IN QUESTION

Pursuant to Rule 29 § 4 (b) of the Supreme Court of the United States the constitutionality of "The United States Headquarters Agreement," Public Law 80-357, 4 August 1947, enacted by the 80th Congress is drawn in question by the petitioner. Therefore, 28 U.S.C. § 2403(a) may be applicable, and a copy of this petition for writ of certiorari will be forwarded to the Solicitor General, in accordance with provision made under Rule 29 . No other notification have been made by any Court of the United States.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i,ii

PARTIES TO THE PROCEEDINGS.....iii

ACT OF CONGRESS DRAWN IN QUESTION.....iii

TABLE OF CONTENTS.....iv

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1,2

CONSTITUTIONAL PROVISIONS INVOLVED.....3

STATUTES INVOLVED.....4

REGULATIONS INVOLVED.....9

OTHER.....10

STATEMENT OF THE CASE.....11

REASONS FOR GRANTING THE WRIT.....27

CONCLUSION.....51

TABLE OF AUTHORITIES

Case ***Page***

De Luca v. United Nations Organization, et al. 841 F.Supp. 531 (S.D.N.Y. 1994)..36,42

Gonzales v. Shanker, C.A.N.Y. 1976., 533 F. 2d 832.....35

Missouri v. Holland, 252 U.S. 416, 40 S.CT. 382, 64 L.ED. 641 (1920).....29,50,51

People v. Coumatos, 1962 224 N.Y.S. 2d 507.....35

Reid v. Corvert, 354 U.S.1(1957)..29,50,51

767 Third Ave. Associates v. Permanent Mission of the Replubic of Zaire to the United Nations. (2d Cir. 1993) 988 F. 2d 295.....46

Waters v. Wisconsin Steel Works of Intern. Harvest Co. C. A. III 1974, 502 F. 2d 1309.....36

OPINIONS BELOW

The District Court's ruling is reported at 841 F.Supp. 531 (S.D.N.Y. 1994), and reproduced at pages A1 - A19 of the appendix to this petition ("Pet. App."). The opinion of the Court of Appeals for the Second Circuit is unreported, and reproduced at pages A20 - A22. The Second Circuit denied the plaintiff's motion for rehearing by an unpublished order reproduced at Pet. App. A23 - A24.

JURISDICTION

The District Court denied plaintiff's motion for default judgment and grant defendants' motion to dismiss the complaint on the basis of immunity on January 10, 1994. The plaintiff appealed and the Court of Appeals for the Second Circuit affirmed the lower Court's judgment by Summary Order on September 29, 1994. Plaintiff filed a

motion for rehearing which the Court of Appeals denied on November 15, 1994. This Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixteenth Amendment to the United States Constitution:

> The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among several States, and without regard to any census or enumeration.

Constitutional Provisions cont'd **Page**

28 U.S.C. § 1254.....2

* * *

28 U.S.C. § 1291.....26

* * *

42 U.S.C. § 1983.....24,34,35,44

§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress.

Statutes involved

26 U.S.C.A. § 1.....31

28 U.S.C.A. § 288d (b).(IOIA).....36,37

§ 288d (b). Representatives of foreign governments in or to international organizations and their officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees. . .

* * *

Statutes involved cont'd **Page**

28 U.S.C.A. § 517.....46,48

28 U.S.C.A. § 1331. 24,27,35

§ 1331. The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * *

29 U.S.C.A. § 1161.....25

§ 1161. Requires employers to allow former employees to elect continued coverage under the employer's group health insurance plan.

* * *

P.L. 80-357.....2,24,27,28,37

Annex I, Article III, in pertinent part:

Section 7, (b) states, except as otherwise provided in this agreement or the General Convention, [1] / the federal, state and local laws of the United States shall apply within the headquarters district.

Section 7, (c) states, except as otherwise provided in this agreement or the General Convention, the federal, state and

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[1]/ The expression "General Convention" means the Convention on Privileges and Immunities.

local courts of the United States shall have jurisdiction over acts and transactions taking place in the headquarters district as provided inapplicable federal, state and local laws.

Section 8, in pertinent part states, . . . no federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall . . . be applicable within the headquarters district . . .

Annex III, Article V, OFFICIALS, in pertinent part:

SECTION 17. The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Government of all Members. The names of the officials included in these categories shall from time to time be made known to the Government of Members.

SECTION 18. Officials of the United Nations shall:

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) be exempt from taxation on salaries and emoluments paid to them by the

United Nations;

(c) be immune from national obligation;

(d) be immune together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;

(e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic mission to the Government concerned;

(f) be given, together with their spouses and relatives depended on them, the same repatriation facilities in time of international crisis as diplomatic envoys;

(g) have the right to import free of duty their furniture and effects at time of first taking up their post in the country in question.

SECTION 19

In addition to the immunities and privileges specified in section 18, the Secretary-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

Statutes involved cont'd ***Page***

SECTION 20

Privileges and immunities are granted to officials in the interest of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21

The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with privileges, immunities and facilities mentioned in this article.

* * *

P.L. 100-204, Title VII, § 701, Dec. 22, 1987, 101 Stat. 1383.....20,44

Public Law 100-204. In pertinent part:

Probable Exemptions to the United Nations Employee Hiring Freeze.

"(a) Findings. . .

Statutes involved cont'd *Page*

"(1) In April 1986, the Secretary General adopted a freeze on the hiring of personnel. . .

"(3) The freeze was designed to reduce U.N. personnel by 15 percent over three years. . .

"(b) Report to Congress. . .

"(2) Such report shall contain as a minimum, a thorough analysis of the following issues:

"(F). . .

"(c) Sense of the Congress.- It is the sense of Congress that-

"(1) the President should take all such actions necessary to ensure compliance with the hiring freeze rule, including withholding all assessed U.S. contributions to the U.N.. . .

"(2) the President, through the Department of State and the U.S. Mission to the U.N., should express to the Secretary-General of the U.N. the insistence of the American people that the hiring freeze continue indefinitely, or until the U.N. has complied. . .

Regulation *Page*

INFORMATION CIRCULAR
NO. 68.....13,14,18

Secretariat, IC/68, 17 June 1946, in pertinent part:

2. The Tax Refund Provision:

(a). . . "Any taxation levied on your salary by your national government will be refunded to you by the United Nations Organization.". . . The tax refund provision is simply part of a contract between the United Nations and the individual staff member employed thereunder. . . .

Staff Regulation

REGULATION 3.3.(staff rule (f)).....14,18

Article III, Regulation 3.3.

(f) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him by the United Nations, the Secretary-General is authorized to refund to him the amount of staff assessment collected from him. . .

Others

208 U.S. Reports 258.....49

389 U.S. Reports 412,420.....49

STATEMENT OF THE CASE

This case presents this Court with the important question of whether officers and employees of an International Organization are immune from performing acts and transactions as administrators, if they violate the laws of the United States; deny plaintiff constitutional and civil rights; violate established regulations of the United Nations.

The plaintiff, Maurizio De Luca, is a citizen of the United States ("U.S."), a resident of New York State, and a veteran of the Vietnam conflict. De Luca, as a permanent staff member of the United Nations ("U.N."), was employed as a security officer from June 1977 to December 1988.

A security officer reports through a chain of command that reaches the chief administrator of the U.N., who is the

Secretary-General ("SG"). The SG's administrative assistants are the Assistant Secretary-General ("ASG"), Director and Deputy Director. Their duties include normal administrative functions such as the enforcement of established rules and regulations, and supervision of lower categories, including professional and general service categories. Besides administrative duties, the SG, and designated ASGs have ties with diplomatic issues. However, "they do not in any capacity represent foreign governments."

Before 1946, U.S. citizens employed at the U.N. as international civil servants did not have to pay income taxes on earned salary. The U.S. government, a Member of the U.N., argued that none of its citizens are exempt from paying income taxes. Citizens who are employed at the U.N. are no exception, and they too, have a

mandatory obligation to pay taxes.

Consequently, in June 1946, there was widespread misunderstanding of the tax refund provision. The U.N. administration through Information Circular No. 68 ("IC/68") instructed U.S. citizens of their "individual liability" for various Federal, State, and local taxes in the U.S.. [They] were required for making declarations of estimated taxes for the year 1946 and each year thereafter.

Declarations of estimated taxes filed by U.S. citizens are controlled by the administrators of the Finance Division of the U.N. The administrators function is to enforce the established regulation of the U.N. pursuant to IC/68, and see to that U.S. citizens are reimbursed the staff assessment (income tax) which is withheld from their salary. Subsequently, the administrators on a quarterly basis issued

estimated tax checks to the citizens. It was the responsibility of the citizens to forward the estimated tax checks to the appropriate U.S. taxing agencies. The "regulations" outlined in IC/68 and staff rule (f) compels administrators of the Finance Division to make such reimbursements. It is characterized precisely as a [contract between the U.N. and the individual staff member that is employed thereunder].

In January of each year, U.S. citizens received a "Statement of Earnings" (W-2) from the administrators of the Finance Division that showed a gross income. This gross income was also reported to the Internal Revenue Service ("IRS)" on form 1099. The U.S. citizens were requested to file tax returns with the U.N. to adjust estimated taxes to actual salary received. After that they filed tax returns with the

respective U.S. taxing agencies.

De Luca filed declarations for estimated taxes for the year 1977 and each year after that including year 1988. He received checks of estimated tax on a quarterly basis "for ten and half years," from June 1977 through December 1987. The checks were forwarded to the appropriate U.S. taxing agencies.

In 1988, the Controller of the Finance Division, ASG Gomez, and Deputy Controller Mills, under the supervision of the SG, Perez de Cuellar, failed to issue estimated tax checks to De Luca.

On August 29, 1988 De Luca was notified by the IRS "via correspondence" (the first notification since he began employment at the U.N.) [for nonpayment of estimated taxes for the year 1988.] see Pet. App. A53. The notification received by De Luca from the IRS confirms the fact that

the defendants failed to issue estimated tax checks.

De Luca, as a U.S. citizen was hampered from fulfilling a statutory obligation that was imposed on the citizens by the U.S. in 1946.

De Luca by not receiving "statutory entitlement" was personally responsible for the disbursement of taxes on his salary. The amount of the estimated tax checks that was withheld and not refunded to him for the year 1988, totaled $10,000.00. The reported gross income to the IRS for the year 1988 was $37,731.90. De Luca was obligated statutorily to disburse additional taxes totaling $6,801.36. He paid out a total of $16,801.36 in taxes, on a salary of $37,731.90, at a tax rate of 45 percent. The aggregated yearly tax rate of 45 percent imposed on De Luca's salary by Gomez, Mills and Perez de Cuellar, became

a financial burden while trying to support a family of four.

If De Luca continued employment at the U.N. under these circumstances, eventually would have been financially destroyed.

Consequently, on September 12, 1988 De Luca submitted a letter of resignation effective December 31, 1988. ASG Annan, of the Human Resources Management ("HRM"), duly accepted De Luca's resignation on October 18, 1988. Annan failed to notify De Luca that his resignation was duly accepted. However, while corresponding with Annan's replacement Ciss, ASG of HRM, Hocine Medili from the same office notified De Luca on June 1, 1991, "via correspondence" of the effective date of the resignation.

De Luca was never afforded the opportunity of an exit interview by Annan, after rendering eleven and half years of

outstanding service, and left the Organization on December 31, 1988.

"Upon the duly accepted resignation of October 18, 1988. Mr. Annan, Gomez, Mills and Perez de Cuellar continued to willfully disregard the established regulations set forth in IC/68 and staff rule (f), and refused to release checks for estimated tax."

In January 1989 Gomez, Mills and Perez de Cuellar failed to furnish De Luca the 1988 Statement of Earnings (W-2) needed to file tax returns with the U.N.. (The W-2 was later requested, via correspondence, by the IRS from the U.N. during a first tax audit). De Luca, under statutory obligation proceeded to file 1988 tax returns with the appropriate U.S. taxing agencies by the April 15, 1989 deadline.

In addition, Annan, Gomez, Mills and Perez de Cuellar failed to furnish De Luca

his final pay statement that was processed in April 1989. Showing a balance due of $850.72, reflecting two weeks of salary and retroactive pay, and additional staff assessment that was withheld, totaling $852.58 (the final pay statement was received, via correspondence, on March 2, 1990 from Eddie Lee of Accounting Division, during a second IRS tax audit). On the final pay statement there were signatures that purported to be that of De Luca's when in fact he had not signed such a written instrument.

During 1989 De Luca had made several unsuccessful attempts to retrieve his final pay statement and received no cooperation from personnel in the office of the Finance Division.

On October 3, 1990, the IRS audited De Luca for the year 1988, for discrepancies reported on form 1099 by Gomez, Mills and

Perez de Cuellar. The audit lasted trough September 13, 1991, and De Luca was exonerated from any wrong doing.

On March 11, 1992 the IRS audited De Luca a second time. Gomez, Mills and Perez de Cuellar reported income on form 1099 showing that De Luca had earned salary for the last two weeks of his employment. This salary was withheld from him and was reported to the IRS as though he had received it. IRS audit lasted through August 14, 1992. De Luca was again exonerated from any wrong doing.

Shortly after not receiving estimated tax checks, and the ensuing investigation that followed, as hereinafter more fully appears, De Luca became aware that during the period of April 1986 to April 1989, pursuant to P.L. 100-204, Title VII, § 701, Dec. 22, 1987, 101 Stat. 1383, Perez de Cuellar was compelled by Congress to reduce

staff by 15 percent or the assessed contribution to the U.N. from the U.S. would be withheld indefinitely or until the reduction was met.

In 1987, Perez de Cuellar and his administrative subordinates Gomez, Mills, Gazzoli, Annan and Bugaev, initiated an internal investigation through the Internal Audit Division ("IAD") of the U.N.. The probe requested U.S. taxpayers to "voluntarily" furnish documents from the IRS related to the filing of income tax returns. This unprecedented undertaking was the first of its kind in the history of the U.N., in matter of fact, "41 years" following the statutory obligation imposed on U.S. citizens by the U.S. government in 1946. Moreover, five countries including the U.S.A. impose statutory obligation on their nationals to pay income taxes. No other national was subjected to this kind

of probing by Perez de Cuellar.

Bugaev, the IAD director, informed HRM that De Luca had furnished incomplete IRS documents. On June 1, 1988 De Luca received a letter from Annan "compelling him" to furnish the remaining documents or [furtherance of estimated tax checks would be stopped]. This was the first notification he had received related to this investigation and had not received any estimated tax checks to that point (Pet. App. A53).

Perez de Cuellar had employed an IRS agent for investigative purposes during this period. The IRS agent was placed in the IAD of the U.N.. De Luca has demanded, through correspondence, that a probe should be initiated to learn "how Bugaev was in possession of privileged information," since he had not submitted Bugaev any documents before the notification of June

1, 1988. Ciss and Duque have refused to take any action on this matter.

In addition, Gazzoli, an officer of the Finance Division corroborated with supervisors of the N.Y.S. Department of Taxation and Finance to deviate the policies set forth by the Department as outlined in an interoffice memorandum to Mills from Gazzoli. The memorandum states that, [the] supervisor of N.Y.S. Department of Taxation and Finance had agreed to make exception to CPU policy and to automatically provide a printout of privileged information even if the requestor had not specifically asked for one . . . and CPU will accept a verbal request to send out privileged information.

De Luca left the Organization in December 1988. Annan of HRM failed to make proper notification to health insurance carrier which deprived him the opportunity

to continue medical benefits on his own.

Administrators, Ciss and his replacement Duque, of HRM were notified "via correspondence" by the plaintiff of allegation set forth in this controversy. Many letters were left unanswered. Ciss and Duque refused to take any action.

De Luca having exhausted all possibilities to resolve this controversy administratively, corresponding with the administrators of the U.N., and the U.S. Mission to the U.N., filed a civil suit on March 30, 1993, in the United States District Court, Southern District of New York.

De Luca filed this action, pursuant to 28 U.S.C. § 1331, Public Law 80-357 ("The Agreement between the United Nations and the United States"), and pursuant to 42 U.S.C. § 1983 of the Civil Rights Act of 1964, alleging that the defendants violated

his rights based on national origin and employment discrimination. The complaint, with exhibits A through H, also alleges Breach of Contract, Forgery, Negligence, violations pursuant to 29 U.S.C.A. § 1161 (Supp.1993), and Nonfeasance of Duty.

On July 26, 1993, De Luca filed Notice of Motion for Default Judgment pursuant to Rule 55(b) (2) of the FRCP for defendants Mills, Gazzoli, Bugaev, and Duque. The District Court accepted De Luca's default judgment on submission if there were no opposition and informed De Luca that he did not have to argue the motion. (Pet. App. A26).

On January 10, 1994, the District Court denied Default Judgment and dismissed the complaint on the basis of immunity, holding that . . . how improper any of these actions may have been, they represent precisely the type of official activity

which was intended to immunize . . .(Pet. App. A15) and . . . that although plaintiff has levelled some serious charges against both the U.N. and the individual defendants, we must bear in mind the policy underlying the immunity from employee actions which international and federal law provides international organization and their officers . . . (Pet. App. A19).

De Luca appealed to the Court of Appeals for the Second Circuit, which had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The Second Circuit, by Summary Order, without rendering an opinion, affirmed the District Court judgement (Pet. App. A21).

De Luca filed a motion for rehearing which the Court of Appeals denied on November 15, 1994.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES AN IMPORTANT QUESTION WHETHER THE PLAINTIFF BEING A U.S. CITIZENS AND EMPLOYED BY AN INTERNATIONAL ORGANIZATION WAS DEPRIVED A RIGHT SECURED BY THE CONSTITUTION WHEN THE LOWER COURTS DISMISSED THE COMPLAINT.

De Luca filed this action pursuant to 28 U.S.C. § 1331, and under Public Law 80-357 enacted by Congress,"The Agreement between the United Nations and the United States of America." Article III, Law and Authority in the Headquarters District, Section 7 (b) and (c).

U.S. citizens, as international civil servants, do not relinquish their fourteenth-amendment rights when they begin working for an International Organization.

Federal legislative power to enforce deprivation of property, without due process of law, or equal protection of the law is found in the fourteenth amendment to

the U.S. Constitution, which grants Congress power to enforce the substantive provision of this amendment by appropriate legislation.

In the subject case Congress is clothed with direct and plenary powers of legislation to regulate International Organizations such as the U.N.. Particularly, the "Headquarters District" which is based in New York State, and where many U.S. citizens are employed therein.

On August 4, 1947 Congress enacted Public Law 80-357 *supra* at 5, 6, 7 and 8, referred to hereinafter as the Agreement. This special legislation was enacted in a joint resolution with the U.N. The enactment of such legislation, "the Agreement," [2]/ was intended not to undercut

[2]/ An "Agreement" authorized or approved by resolution of Congress, by majority vote in both Houses, is equivalent of a treaty for virtually all purposes.

American constitutional guarantees regarding U.S. citizens employed at Headquarters District.

This Court, in *Reid v. Covert*, 354 U.S. 1 (1957), has held that nothing is found in the history or language of the Supremacy Clause, Article VI, § 2 which intimates that "treaties and laws" enacted pursuant to them do not have to comply with the provisions of the Constitution. Moreover, in *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.ED. 641 (1920) this Court found nothing to the contrary and carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution.

The regulating legislation under the "Agreement" provides jurisdiction of

appropriate American authorities, [3]/ violation of U.S. laws, acts and transactions which take place within Headquarters District, and regulations or laws of the U.S. as long as there are not inconsistent with U.N. regulations.

When Congress enacted the "Agreement," it had the plenary power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect to "Headquarters District." "**The content of the Agreement is consistent with Constitutional provisions regarding domestic affairs affecting individual rights.**"

The U.S. Government imposes on its

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[3]/ The expression "appropriate American authorities" means such federal, state, or local authorities in the United States as may be appropriate in the context and in accordance with the laws and customs of the United States, including the laws and customs of the state and local government involved.

citizens a "statutory obligation" to pay taxes which Congress has legislative power to enact under the sixteenth amendment. This obligation is enforced by the Internal Revenue Code ("I.R.C."), i.e., 26 U.S.C.A. § 1. etc...

Subsequently, when the U.S. Government imposed a "statutory obligation" on the citizens employed at "Headquarters District," to pay income taxes, here, the obligation is also enforced by the I.R.C., which is in common with the rest of the citizenry.

Consequently, in 1946, the U.N., establishes "regulations" outlining procedures to meet the obligatory requirements and entitlement for U.S. nationals. These regulations, *supra* at 9 and 10, were enacted in compliance with Congressional legislation.

The reimbursement of taxes in this

instance is not only a matter of "statutory entitlement," which is in accordance with the laws and custom of the U.S., *see supra* note 3, but is also a matter of "property interest."

To terminate "statutory entitlement" involves defendants action that adjudicates important rights under the Constitution. The extent to which procedural due process must be afforded to the plaintiff is influenced by the extent to which he may be condemned to suffer grievous loss and the foreseeable harm, since the established regulations of the U.N. require only "**enforcement not deviation.**" [4]/

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[4]/ This Court should note that, granting immunity for violation of an established regulation, "the deprivation of statutory entitlement," places the U.S. citizen's position (employment) at Headquarters District "in jeopardy."

In theory, if an administrator (for what ever reasons or motive) decides to eliminate a position that is held by a U.S. citizen, under the doctrine of "stare

The regulations of the U.N. has established a "property interest" of statutory entitlement. In this case, the "liberty interest in reputation" implicated by the suspension of statutory entitlement is found where the defendants willfully disregarded the plaintiff's obligation to pay taxes which caused him harm, and thus "significantly altered his status as a matter accustomed by U.S. citizenry." Here, the due process clause also forbids deprivation of liberty, i.e., "where a person's good name, reputation, honor, or integrity is at stake."

The defendants have imposed grievous loss and the foreseeable harm on the plaintiff. The acts and transactions were

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decisis" *De luca v. The United Nations et al*, he is permitted to deprive "statutory entitlement" and subjects the citizen to a 45 percent tax rate or more, which the ultimate result would be resignation.

knowingly done with the purpose of doing that which the U.N. established regulations prohibit. Defendants cannot be said to suffer of warning or knowledge that the acts and transactions which they have allegedly committed are in violation of U.N. regulations.

Further, since 42 U.S.C.A. § 1983 *supra* at 4, establishes a *civil* remedy, and does not contain the word "willfully," the plaintiff need not to prove specific intent as to why defendants have violated U.N. regulations. The defendants under § 1983 are liable to the plaintiff injured in an action of law, suit in equity, or other proper proceedings for redress.

Counsel for the defendants has held that De Luca had an internal administrative grievance procedure to follow for redress. De Luca notified the lower Courts through memorandum and brief that U.N.

administrators have "no intention" of having this case, or cases pending on the subject matter come before the Administrative Tribunal of the U.N., and subsequently the right to appeal his case before the International Court of Justice ("I.C.J.").

Furthermore, the U.N. is not self-executing; [the] U.N. does not have the authority to try Civil or Criminal cases. *See People v. Coumatos*, 1962 224 N.Y.S.2d 507, and the I.C.J. is not empowered to enforce judgments on the defendants, as in case of Gomez (Pet. App. A34).

Under the Agreement, Section 7 (b) and (c), and pursuant to 28 U.S.C. § 1331 and 42 U.S.C.A. § 1983, the plaintiff alleging violation of Constitution and civil rights did not need to exhaust an administrative grievance procedure before bringing a suit in District Court. *See Gonzales v. Shanker*,

C.A.N.Y. 1976, 533 F. 2d 832, *and Waters v. Wisconsin Steel Works of Intern. Harvest Co.* C.A. III 1974, 502 F 2d 1309.

Consequently, the lower Courts have not considered the constitutionality of the "Agreement" pertaining to Headquarters District, were it affects U.S. citizens individual rights, before dismissing the complaint on the basis of immunity.

II. THE COURTS CLEARLY MISAPPLIED THE STANDARD FOR QUALIFIED IMMUNITY BY NOT CONSIDERING THE "AGREEMENT" AND HOLDING THAT THE DEFENDANTS ARE IMMUNE FROM EMPLOYEE'S ACTION WHICH INTERNATIONAL AND FEDERAL LAW PROVIDES.

The District Court recognizes [the] defendants to have immunity from employee's action, which international and federal law provides International Organizations and their officers . . . *See De Luca v. United Nations Organization, et al*, 841 F. Supp. 531 (S.D.N.Y. 1994).

The lower Courts decision in this case

is worthy of this Court's review for several reasons. First, to recognize the standard qualified immunity for officers and employees of an International Organization from employee's action, which is governed under "**general**" legislation pursuant to International Organization Immunities Act ("I.O.I.A."), 22 U.S.C.A. § 288d (b), was "clearly misapplied" by the lower Courts. Applying the standard for qualified immunity pursuant to international and federal law in this case is in conflict with Congressional direct and plenary powers to enact special legislation "**exclusively**" for "Headquarters District" of the U.N.. Here the "Agreement" is not recognized or considered by the lower Courts.

Furthermore, Congress, needed not to enact special legislation (Public Law 80-357), if § 288d (b), *supra* at 4, accords

officers and employee of an International Organization with qualified immunity relating to acts performed by them officially and "falling within their function" as such officers or employees; keeping in mind that the U.N. is an International Organization pursuant to **Ex. Ord. No. 9698, Feb. 19, 1946, 11 F.R. 1809.**

Additionally, this Court should note that cases relied upon by the defendants, on the issue for standard qualified immunity, none of the International Organizations have an "Agreement" that is regulated by **"special Congressional legislation"** or that it pertains exclusively to their Headquarters District.

The lower Courts judgment based on international law is in conflict with the direct and plenary power of laws enacted by Congress. Thereby, the standard qualified immunity in this case was clearly

misapplied by the District Court and sanctioned by the Court of Appeals.

Finally, the "Agreement" clearly specifies the standard for qualified immunity regarding Headquarters District pursuant to Annex III, "The Convention on Privileges and Immunities" ("C.P.I."). The C.P.I. should be the only document in determining the defendants' immunity.

II.(A)

THE COURTS CLEARLY MISAPPLIED THE STANDARD FOR QUALIFIED IMMUNITY BY HOLDING THAT THE DEFENDANTS ARE OFFICIALS AND IMMUNE PURSUANT TO THE CONVENTION ON PRIVILEGES AND IMMUNITIES, FROM ADMINISTRATIVE ACTS AND TRANSACTIONS WHICH DEPRIVED THE PLAINTIFF INDIVIDUAL RIGHTS AND CAUSED HIM HARM AND GRIEVOUS LOSS

The C.P.I. is referred in Annex III of the Agreement, [5]/ which was

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[5]/ The Court should note that the "Headquarters Agreement" specifically refers to the C.P.I. and not to provisions under International Organization Immunities Act, ("I.O.I.A.") 22 U.S.C.A. § 288d (b) for qualified immunity.

adopted by the General Assembly of the U.N. on February 13, 1946.

Article V, of the C.P.I. addresses "officials" of the U.N.. Under Section 17, the SG of the U.N. will specify the categories of officials to which the provisions of this Article and Article VII apply, and submit these categories to the Government of all Members. The names of the officials included in these categories are from time to time made known to the Government of Members.

Plaintiff requested from defense counsel, through the District Court, to submit the actual list of names of the officials submitted by the SG to the General Assembly ("GA") for the year 1988 to which Article V would apply. This list would establish who is and is not an official of the U.N.. "The list of names was never presented in evidence before the

District Court or the Court of Appeals."

Basnayake, from the legal staff of the U.N., in response to the plaintiff's request, submitted an affidavit in which he categorizes the named defendants to be officials. [6]/ In addition, Ssekandi, counsel for the defendants, has argued in the Circuit regarding the lowest entry position of a staff member at the U.N. (which would include the custodian). He categorizes the staff member who holds that position to be an "official" of the U.N. The Circuit, during oral argument of September 16, 1994, showed concern related to a staff member of the U.N. being an "OFFICIAL." (Pet. App. A39-A41).

This point is also worthy of this Court's review for the following reasons:

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[6]/ This Court should note that the affidavit presented by Basnayake cannot be regarded as an "official record."

If the lowest entry position of a staff member is accorded "official" status, then under Article V, Titled "**OFFICIAL**," the staff member enjoys such privileges and immunities pursuant to Section 18, *supra* at 6.

Is it the intent of Congress to enact such legislation? Does the lower Courts recognize a staff member of the U.N. being accorded privileges and immunities under Section 18? If a staff member is recognized as an "OFFICIAL" what are the consequences and implications under the doctrine of "stare decisis" *De Luca v. United Nations Organization, et al, supra*, if, this case sets a precedent?

However, we find that Article V, Section 19, *supra* at 7, specifies the "titles" of SG and ASG and accords them with privileges and immunities. This Court should note that the C.P.I. does not accord

any other "title" with privileges and immunities.

The privileges and immunities accorded to "officials," however, revolve on the performance of their acts and transactions that fall within the function of their official capacity. "We must keep in mind that the acts and transactions which they perform in an official capacity, first, fall within their job description, and secondly, are function performed strictly in the interest of the U.N.," as specified in Section 20, *supra* at 8, which states; [that] privileges and immunities are granted to officials in the interest of the U.N. and not for personal reasons. . .

Whether an official protected by standard qualified immunity may be held personally liable for an alleged unlawful official action generally, turns on the objective legal reasonableness of the

action assessed in light of clearly established regulations, and is based on the nature of function performed, not the identity of actor who performed it.

In this case the administrators are not diplomats; have no functional tie with diplomatic issues; and they do not represent in any capacity a foreign government. Then the question here is, whether it is in the interest of the U.N. for Gomez, Mills, Perez de Cuellar and the remaining defendants to violate regulations, cause the plaintiff harm, grievous loss, and deprived him a right secured by the U.S. Constitution pursuant to 42 U.S.C.A.§ 1983.

If the answer to this question is considered negatively, then the actions could reasonably have been thought to be personal; a 15 percent reduction of staff pursuant to P.L. 100-204, Title VII, § 701,

supra at 8, or perhaps for other personal motive.

Here, the lower Courts misapplied the standard for qualified immunity by not distinguishing who is and who is not an official of the U.N., and the performance of the function rather the identity of who performed it.

III. THE STATE DEPARTMENT WAS PREJUDICIAL IN REQUESTING THAT THE GOVERNMENT APPEAR IN THIS ACTION AS "AMICUS CURIAE" THEREBY DENYING THE PLAINTIFF DUE PROCESS

On November 22, 1993 the plaintiff filed a motion to object to the statement of interest made by the Government (State Dep"t). Dated October 13, 1993, submitted to the District Court on November 23, 1993. The Motion was denied on December 10, 1993 for the following reasons: [The] plaintiff objects to the Government statement of interest on the grounds that it expresses support for the view of defendant United

Nations. However , the Government has properly submitted a statement of the nation's interest in this case pursuant to 28 U.S.C. § 517 (1993), which provides that "any officer of the Department of Justice may be sent by the Attorney General to any ... district in the United States to attend to the interests of the United States in a suit pending in a court of the United States." Moreover, federal courts have routinely considered statements of interest by the United States in cases such as this, which might impact on the nation's international obligations. See, e.g. *767 Third Ave. Associates v. Permanent Mission of the Republic of Zaire to the United Nations*, (2d. Cir. 1993) 988 F. 2d 295. [7]/

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[7]/ In this case, the U.S. Attorney points out the objectivity of the Government, where an erroneous conclusion could result in an international

The plaintiff, on appeal, filed a motion with the Second Circuit Court, again objecting to the government's appearance as Amicus Curiae. The motion was denied on August 4, 1994. On August 12, 1994 he filed a motion to reconsider and was denied on August 29, 1994.

"The definition of prejudice as defined by law occurs when there is a leaning toward one party to a lawsuit." The Government (State Department) had placed the plaintiff at a disadvantage, when Richard W. Mark, Assistant U.S. Attorney hand delivered a letter to the District

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entanglement based on diplomatic issues. However, in the subject case nothing can be found that is tied with diplomatic issues. The issue here is related to domestic (custom) affairs which affects individuals rights pursuant to the Constitution and laws of the U.S. What impact can this case have on the nation's obligations which would cause international implications, and subject U.S. citizens to be retaliated against outside the territory of the U.S.?

Court stating that . . .the Government joins the U.N. in dismissing the complaint . . . see Pet. App. A52.

The Government, in effect, had taken a positive position by availing to the lower Courts that it was in favor of having this complaint dismissed. The cause of action taken by the Government with the lower Courts was detrimental to the rights (due process) of the plaintiff. . . as the complaint was dismissed.

In light of the fact that the Government is within its right as Amicus Curiae pursuant to U.S.C. § 517 and Rule 29 of the F.R.C.P.. it cannot be "objective" if it prefers to take side, or that it has interfered in this action as outlined in plaintiff-appellant's brief. "After all, it was the Government who imposed statutory obligation on the plaintiff to pay income taxes, and it was the defendants who denied

statutory entitlement to fulfill such an obligation."

Nothing in the Constitution suggests that the rights of the plaintiff in respect to the "Agreement" are different from what they are in relation to other laws of the U.S. affecting individual rights. The Government has deprived the plaintiff Constitutional rights. The secured rights of individuals granted by the State or the Federal constitution and protected from governmental interference (389 U.S. Reports 258). The Constitution gives a permanence and stability to government and is not designed to protect majorities, who can protect themselves, but to preserve and protect the rights of the minorities against arbitrary action of those in power (208 U.S. Reports 412, 420). The Constitution is the supreme law of the land and it cannot be abrogated even in part by

statute.

In summation, the lower Courts decision conflicts with this Court's precedent in *Reid v. Covert*, 354 U.S. at 22, and in *Missouri v. Holland*, 252 U.S. at 22. The U.S. Constitution should outweigh any statute, treaties, Supremacy Clause, Article VI, § 2, or administrative ruling that the defendants or the State Department may claim to have as a right in this action.

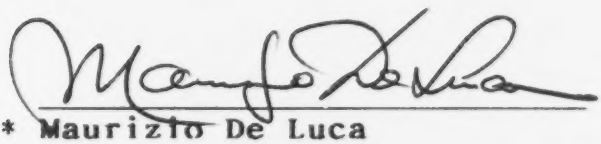
CONCLUSION

This Court should therefore grant the plaintiff's petition and issue a writ of certiorari to review the lower Courts judgment in this case. [8]/

Dated: February 7, 1995.

Respectfully submitted,

PETITIONER



* **Maurizio De Luca**
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* Pro Se Litigant

---

[8]/ If this Court elects not to address the issue presented in this writ at the present time, it is requested that the writ issue and that the matter be remended to the Court of Appeals for redetermination in light of this Court opinions in **Reid, supra,** and **Missouri, supra.**

APPENDIX TABLE OF CONTENTS

TITLE *PAGE*

RULING OF THE DISTRICT COURT.....A1

RULING OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.....A21

DENIAL OF PETITION FOR REHEARING.....A24

DEFAULT JUDGEMENT LETTER.....A25

TRANSCRIBED ORAL ARGUMENT HEARD BEFORE THE CIRCUIT COURT JUDGES.....A27

LETTER FROM THE US ATTORNEY TO THE DISTRICT COURT.....A52

IRS NOTIFICATION.....A53

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
MAURIZIO DE LUCA,

Plaintiff,

-against-

THE UNITED NATIONS ORGANIZATION, JAVER PEREZ DE CUELLAR, LOUIS MARIA GOMEZ, ARMANDO DUQUE, KOFI ANNAN, ABDOU CISS, OLEG BUGAEV, SUSAN R. MILLS, FREDERICK GAZZOLI,

Defendants.
----------X

MEMORANDUM AND ORDER
93 Civ. 2021 (wk)

WHITMAN KNAPP, SENIOR D.J.

Plaintiff moves for default judgment against the United Nations and eight U.N. officials and employees under Federal Rule of Civil Procedure 55 (b) (2). On March 30, 1993, plaintiff filed a complaint pro se alleging breach of contract, forgery, negligence and the violation of federal civil rights and employee medical benefits law. When plaintiff serves process upon defendants during April, May and June 1993, the U.N. Legal Counsel wrote the court

explaining that the organization and the individual defendants -- with respect to acts performed by them in their official capacity -- are immune from all legal process under international and United States law. None of the defendants have answered the complaint. Presently, the U.N., on behalf of itself and the eight individual defendants, moves to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of service of process and on the basis of immunity. The United States appeared at oral argument on the motions on September 10, 1993, and has submitted a statement of interest in support of defendants' motion to dismiss.

For reasons that follow, we deny plaintiff's motion for default and, on the basis of immunity, grant defendants' motion to dismiss the complaint.

BACKGROUND

Plaintiff, a Unites States citizen, was employed by the U.N. as a security officer form June 1977 until December 31, 1988, the effective date of his resignation. Pursuant to regulations set forth by its General Assembly, the U.N. withholds the estimated federal and local taxes of staff members whose national governments require them to pay such taxes based on their U.N. salaries. It then reimburses the employees, enabling them to pay their taxes directly to their national governments. Between 1977 and 1987, the U.N. withheld plaintiff's estimated federal, state and local income taxes and then reimbursed him in the form of checks made payable to himself and the Internal Revenue Service. However, for the tax year 1988 the U.N. claims that it did so because plaintiff failed to provide it with

certified copies of this 1988 tax return. Plaintiff alleges that the U.N. reported to the I.R.S. that it had reimbursed his withheld taxes for 1988. This information, plaintiff contends, led the I.R.S. to audit him for those tax years between 1990 and 1992. Moreover, because the U.N. never reimbursed him in 1988, plaintiff was personally required to pay $6,801.36 in federal, state and local tax for that year.

Plaintiff contends that the U.N.'s actions constituted breach of his employment contract, prima facie tort, injurious falsehood and employment discrimination prohibited by Title VII, 42 U.S.C.A. 2000e et seq. (1981 & 1991). He alleges that in 1987, in retaliation for pressure exerted by the United States on the U.N. to reduce its personnel during the mid-1980s, U.N. Secretary-General Javer Perez de Cuellar initiated an unprecedented

tax audit of United States nationals employed by the organization, including himself. Plaintiff claims that U.S. nationals were singled out in the audit, as the U.N. never audited the nationals of four other countries which, like the U.S., require that U.N. employees pay national taxes.

After plaintiff left the U.N., on April 20, 1989, its Finance Division issued a "final pay statement" which indicated that plaintiff had received $850.72 in retroactive pay and compensatory time which he alleges he never received. Plaintiff further alleges that this final pay statement contained his forged signature and was issued with the intent of defrauding him of his remaining salary and compensatory time.

Finally, plaintiff claims that the U.N. denied him continuation of his medical

benefits after his resignation in violation of 29 U.S.C.A. § 1161 (Supp. 1993), which requires certain employers to allow former employees to elect continued coverage under the employer's group health insurance plan.

DISCUSSION

Plaintiff contends that he is entitled to default judgement against defendants because they failed to answer his complaint, which alleges damages in the amount of $1,408,504.76. The U.N. argues that plaintiff's complaint must be dismissed under Fed. R. Civ. Pro. 12(b) because both itself and the individual defendants, who are alleged to have been acting in the course of their employment, are cloaked with immunity under international and federal law. On a motion to dismiss, a district court must construe the complaint in favor of the pleader, see Scheuer v. Rhodes (1974) 416 U.S. 232, 236,

and must accept as true its factual allegations. See LaBounty v. Adler (2d Cir. 1991) 933 F. 2d 121,123. We separately discuss plaintiff's claims against the United Nations and those against the individual defendants.

A. THE UNITED NATIONS

Under the Convention on the Privileges and Immunities of the United Nations ("U.N. Convention"), Feb 13, 1946, 21 U.S.T. 1418, 1422, T.I.A.S. 6900, acceded to by the United States in 1970, the U.N. and "its property and assets" enjoy immunity from "every form of legal process except insofar as in any particular case it has expressly waived its immunity. " U.N. Convention, art. II sec. 2; see also Boimah v. United Nations General Assembly

(E.D.N.Y. 1987) 554 F.Supp. 69, 71. [1]

A district court may dismiss a complaint based on a defendant's established immunity. Properly invoked immunity shields a defendant "not only from the consequences of litigation's results, but also from the burden of defending themselves." Davis B. Passman (1979) 442 U.S. 228, 235 n.11,

---

[1]/ The International Organizations Immunities Act ("IOIA"), 22 U.S.C.A. § 288 et seq. (1990 & Supp. 1993), enacted in 1945, cloaks the U.N. with similar immunity. Under IOIA, designated international organization receive the same immunity as that "enjoyed by foreign governments, except to the extent that such organization may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C.A. § 288a(b). The U.N. was so designated by executive order in 1946. See Ex. Ord. No. 9698, 11 F.R. 1809 (Feb. 19, 1946). The immunity of foreign governments is now governed by foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C.A. § 1602 et seq. (Supp.1993). The FSIA confers on foreign governments general jurisdictional immunity subject to several exception to the instant case, for the U.N. Convention, which contains no such exception, provides sufficient ground for finding the U.N. immune from plaintiff's claims.

quoting Dombrowski v. Eastland (1967) 387 U.S. 82, 85. Plaintiff has not alleged that the U.N. has expressly waived its immunity in this instance and no evidence presented in this case so suggests. Finding the U.N. to be immune from plaintiff"s claims, we dismiss them.

B. INDIVIDUAL DEFENDANTS

Of the eight current or former U.N. officials and employees named as individual defendants, two currently serve as Assistant Secretaries-General -- Luis Maria Gomez and Kofi Annan. The U.N. convention confers upon such officers "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law." U.N. Convention art. V, sec. 19. In the United States, Article 31 of the Vienna Convention of Diplomatic Relations ("Vienna Convention"), Apr. 18, 1961, 22 U.S.T.

3227, T.I.A.S. 4502 (entered into force for the U.S. Dec. 1, 1972) governs the privileges and immunities of diplomatic envoys and provides, in pertinent part:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) A real action relating to private immovable property...
>
> (b) An action relating to succession in which the diplomatic agent is involved...
>
> (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

Assistant Secretaries-General Annan and Gomez are immune from plaintiff's claims under the U.N. and Vienna Conventions as none of the exceptions listed in Article 31 of the Vienna convention apply here. The instant case is neither a real action

relating to private immovable properly nor a succession action. Moreover, it involves neither a commercial nor professional activity exercised by either of these defendants outside their official functions. Rather, plaintiff has alleged that Gomez failed to reimburse him for taxes the U.N. withheld and that Annan denied him the right to elect continued coverage under the U.N.'s group health plan.

One of the remaining six defendants is a former U.N. Secretary-General -- Javer Perez de Cuellar -- and another is a former Assistant Secretary-General -- Abdou Ciss. Persons formerly serving the U.N. in such capacity are protected by the same immunity afforded <u>former</u> diplomatic agents under the Vienna Convention -- immunity "with respect to acts performed by such [] persons in the exercise of [their] functions as [] member

[s] of the mission..." Vienna Convention, Art. 39(2). Because plaintiff's claims against Perez de Cuellar and Ciss are based solely on their official activities at the U.N., these defendants are immune from the current action. Plaintiff's claims against the former Secretary-General are based on the following: (1) his alleged supervision of the U.N. Finance Division, which failed to reimburse plaintiff for his 1988 taxes and which, plaintiff claims, issued a forged and fraudulent pay statement; (2) his alleged supervision of the U.N. Office of Human Resources Management, which plaintiff claims denied him extended medical coverage; (3) his alleged supervision of the U.N. Office of Human Resources Management, which plaintiff asserts failed to respond to complaints he filed about the taxes, the pay statement and his medical coverage; and (4) his

creation of the 1987 tax audit that plaintiff claims was intended to retaliate against the U.S. Similarly, plaintiff's complaint alleges that Ciss, who ran the U.N. Office of Human Resources Management, failed to investigate plaintiff's complaints regarding the aforementioned misconduct.

The remaining four defendant are current or former U.N. officers: Armando Duque, former Director of Personnel of the U.N. Office of Human Resources Management; Susan R. Mills, Deputy Controller: Frederick Gazzoli, Acting Chief of the Internal Audit Section of the U.N. Development Program; and Oleg Bugaev, Director of the Internal Audit. Under § 7(b) of the International Organizations Immunities Act ("IOIA), 22 U.S.C.A. § § 288 et seq. (1990 & Supp. 1993), U.N. Officers and employees are immune from suit and

legal process "relating to acts performed by them in their official capacity and falling within their functions as [] officers or employees, except insofar as such immunity may be waived by the [U.N.]." IOIA, 22 U.S.C.A. § 228(b). [2] Here, plaintiff has not alleged that the U.N. has waived the immunity of these four defendants.

We find these four defendants immune from plaintiff's claims under IOIA because those claims relate only to acts performed by them "in their official capacity." The complaint alleges that Duque failed to

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[2]/ The U.N. Convention similarly confers upon certain categories of U.N. officials -- those designated by the Secretary General -- "immu[ity] from legal process in respect of words spoken or written and all acts performed by them in their official capacity." U.N. Convention, art. V., sec. 18(a). We need not determine which individual defendants fall within such designated categories as the officer immunity provision of IOIA, § 7(b), applies to all of them.

investigate plaintiff's complaints; that Mills never reimbursed plaintiff for his 1988 taxes and produces a false and forged pay statement; and that Gazzoli and Bugaev, for auditing purposes, obtained documents regarding plaintiff's taxes from New York State officials. Notwithstanding how improper any of these actions my have been, they represent precisely the type of official activity which § 7(b) of IOIA was intended to immunize. See, e.g., Tuck V. Pan Am. Health Org. et al. (D.C. Cir 1981) 668 F. 2d 547 550, fn. 7 (Director of Pan American Health Organization (PAHO) immune under IOIA § 7 (b) from plaintiff's breach of contract and race discrimination claims to the extent that "the acts alleged in the complaint relate to [his] functions as PAHO Director"); Boimah v. United Nations General Assembly (E.D.N.Y. 1987) 664 F.Supp. 69, 71 (individual officers of the

U.N. General Assembly would have been immune from plaintiff's employment discrimination action under § 7(b) had plaintiff chosen to sue them individually).

Plaintiff contends that none of the individual defendants are immune because in participating in the alleged misconduct each violated either federal and state law or the U.N.'s own internal regulations. However, the case law applying § 7(b) rejects the notion that a defendant's immunity under IOIA can be defeated by allegations of illegal conduct. See, e.g., Tuck; Boimah. Plaintiff would have us rely on People v. Coumatos, (Gen. Sess. N.Y. Co. 1961) 224 N.Y.S.2d 504, later opinion, Gen. Sess. N.Y. Co. 1961 224 N.Y.S.2d 507, aff'd mem. (1st Dep't 1964) 247 N.Y.S.2d 1000, in which the trial court held that defendant, a U.N. inventory clerk indicted on forty-four counts of grand larceny, had

no diplomatic immunity preventing it form exercising its jurisdiction over the case. The trial court noted that the defendant failed to claim that his alleged crimes, which involved theft against his co-workers, we either "directly or remotely related to the functions of his U.N. employment." 224 N.Y.S.2d at 510. Coumatos is clearly inapposite as plaintiff's claims challenge actions which defendants have taken in implementing U.N. employment and financial policy.

Similarly unavailing is plaintiff's assertion that defendants acted in bad faith or with improper motive. That assertion has no bearing on our determination whether or not they are immune from the present action under IOIA. See, e.g., Donald v. Orfila (D.C. Cir. 1986) 788 F.2d 36. In Orfila, the D.C. Circuit found defendant, Secretary-General

of the Organization of American States (OAS), immune under IOIA § 7(b) from plaintiff's action for breach of contract and intentional infliction of emotional distress, notwithstanding plaintiff's claim that the Secretary had acted in bad faith. The court refused to characterize plaintiff's termination from employment at the defendant based on the asserted impropriety of defendant's motive, reasoning that if it were to determine defendant's immunity in such a manner, "the 22 U.S.C. § 228(b) immunity shield, which Congress intended to afford solid protection, would indeed be evanescent." Id. at 37.

Although plaintiff has levelled some rather serious charges against both the U.N. and the individual defendants, we must bear in mind the policy underlying the immunity from employee actions which

international and federal law provides international organizations and their officers, as stated by the D.C. Circuit:

> [T]he purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide.

Mendaro v. World Bank (D.C. Cir. 1983) 717 F.2d 640, 615-16. Finding that the U.N. and the eight individual defendants are immune from this actin under international and federal law, we deny plaintiff's motion for default judgment and grant defendants' motion to dismiss the complaint in its entirety with prejudice.

SO ORDERED.

New York, New York
January 10, 1994

/S/_____
WHITMAN KNAPP, SENIOR U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 29th day of September, one thousand nine hundred and ninety-four.

PRESENT:

HON. J EDWARD LUMBARD,

HON. JAMES L. OAKES,

HON. FRANK X. ALTIMARI,

Circuit Judges.

DE LUCA v. UNITED NATIONS ORGANIZATION, ET AL.

DOCKET NUMBER 94-7158

[FILE STAMPED SEP. 29, 1994]

Appeal from the United States District

Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by plaintiff pro se, by counsel for the defendants, and by counsel for the government as amicus curiae.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgement of the district court be and it hereby is AFFIRMED.

Maurizio De Luca, pro se, appeals from a judgment of the United states District Court for the Southern District of New York (Knapp, J.), denying De Luca's motion for default judgment pursuant to Fed. R. Civ. P. 55(b) (2) and granting defendants' motion to dismiss De Luca's complaint on the basis of immunity.

We affirm the judgment for substantially the same reasons set forth in the district court's Memorandum and Order of January 10, 1994.

/s/_____

HON. J. EDWARD LUMBARD,

/S/_____

HON. JAMES L. OAKES,

/S/_____

HON. FRANK X. ALTIMARI,

Circuit Judges.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse ion the City of New York, on the 15th day of November, one thousand nine hundred and ninety-four.

De Luca v. United Nations Organization, et al.

DOCKET NUMBER 94-7158

[FILE STAMPED NOV 15 1994]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the pro se appellant MAURIZIO DE LUCA.

Upon consideration by the panel that decided the appeal, it is Ordered that said

petition for rehearing is DENIED.

It is further ordered that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES DISTRICT COURT

Chambers of
JUDGE WHITMAN KNAPP
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007

July 29, 1993

Maurizio De Luca
152 Leverett Avenue
Staten Island, New York 10308

Re: De Luca v. United Nation, et al. 93 Civ. 2021 (WK)

Dear Mr. De Luca,

The Judge has asked me to inform you that he is in receipt of your motion for default judgment, and to reschedule the return date to September 10, 1993 at 2:00 p.m. You should contact chambers on September 9, as the Judge will accept the motion on submission if there is no opposition, and there will be no reason for you to argue the motion.

Sincerely yours,

/s/_____
Edward Hernstadt
Law Clerk to Judge Knapp

cc: Carl-August Flieschauer
Javier Perez de Cuellar
Luis Maria Gomez
Armando Duque
Frederick Gazzoli
Kofi Annan
Abdou Ciss
Oleg Bugaev

UNITED STATES COURT OF APPEALS
SOUTHER DISTRICT OF NEW YORK
----------X
MAURIZIO DELUCA,

Appellant,

-against- Docket No.
94-7158

UNITED NATIONS, ET. AL,

Appellee,
----------X

Heard September 16, 1994
Courtroom # 1705
United States Courthouse
40 Foley Square
New York, New York

BEFORE: HON. FRANK X. ALTIMARI
Presiding
Circuit Court Judge
HON. J. EDWARD LUMBARD
Circuit Court Judge
HON. JAMES L. OAKES
Circuit Court Judge

(Transcribed From Tape)

A P P E A R A N C E S:

MAURIZIO DELUCA
Pro Se

FRANCIS M. SSEKANDI, ESQ.
Representing United Nations, Et. Al.

DEOBRAH Y. YEOH, ESQ.
Representing the United States

JUDGE ALTIMARI: Deluca vs. United Nations.

MR. DELUCA: Good morning, your Honors.

JUDGE ALTIMARI: Good morning.

MR. DELUCA: May it please the Court, my name is Maurizio Deluca, and I represent myself in this case.

Your Honors, I'm appealing the final judgment of the Court below which includes the denial of the default judgment and the dismissal of the complaint based on immunity and not on the merits of the case.

The Court below has overlooked or did not consider three documents on the record. The first is the General Assembly document noted in Appendix 13, Page 315 footnote which states that, "Employees of the United Nations who are locally recruited and assigned to hourly rate do not enjoy the privileges of immunity." We have two

defendants that fall under this category, Ms. Mills and Mr. Gizzoli (phonetic). They are both locally recruited and assigned to hourly rate. As a matter of fact, your Honors, I have the salary scales here to produce as evidence or as reference if the Court wishes to see them.

The second document is the -- referred to, employment contract disputes, which is noted in Appendix 13, Page 316. If there is a contract, which there is in this case, your Honors, then there is a dispute then all members of the secretary are sueable, and the wording under the Conventions and Privileges Immunity, Article 5, Section 18A, "Be immune from legal process does not apply here since the conclusion of such a contract is not an act which the appointee performs in his official capacity that's the basis of its official capacity."

The third document -- under this

document, your Honors, there are four defendants that fall under: Mr. Bugahav (phonetic), Mr. Dukee, Ms. Mills and Mr. Gizzoli. The third document is the agreement between the United States and the United Nations.

In 1947, Congress adopted a joint resolution with the United Nations, that resolution being the agreement between the United States and the United Nations. Under Article 3, Sections 7 and 8, it states, in pertinent part, "That the Federal Court has jurisdiction over acts and transactions taking place in Headquarter's District Area of the United Nations as provided under the applicable United States laws as long as the United States laws are not inconsistent with the United Nations regulations. The United Nations regulations, however, do not advocate forgery, prima facie tort,

injurious falsehood, employment discrimination, violations of medical benefits, denial of an internal due process, the tribunal, and violations under the Constitution and Human Rights.

Your Honors, it's the intent of congress to see that every American citizen has and retains his rights under the constitution of the United States, even though the United States citizen is an international civil servant.

This agreement applies to all of the defendants as it applied to Mr. Camotos (phonetic) in case of People v. Camotos. Judge Muoki (phonetic), in his decision, stated that if a person does not have diplomatic immunity, and I emphasize diplomatic immunity, the answer seems to be contained in the agreement, Article 3, Sections 7b and c.

And the Court of appropriate authority

had jurisdiction over acts and transactions taking place in Headquarter's District Area, and it had jurisdiction to try and determine the issues between the parties.

Your Honors, we're talking about -- we're not talking about Camotos' functions related to employment. We're talking about Camotos, the acts and transactions that he committed within Headquarter's District Area that fall under the agreement.

In Paragraph 11 of my Complaint noted in Appendix 18, I refer to violations of human rights. The United Nation's Constitution is the International Bill of Human Rights. And it states in Article 8 that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted and by the constitution or by law."

Your Honors, if opposing counsel sent

the summons and complaint, the complaints back to the Court, if there's and additional summons received, they too will be returned to Court.

Where is my provisional remedy as a United States citizen under the Constitution or under the International Bill of Human Rights? And they state that they have absolute immunity. Well, let's take a look at this absolute immunity.

In a recent case, and subsequent dismissal of this case, Mr. Gomez was found guilty of sexual harassment and document tampering, in the International Court of Justice, by Justice Melacaro (phonetic). This case dates back to 1988 which is in the same time frame as my controversy. I have alleged all along that Mr. Gomez in a concerted matter has held documents that I will not be able to file my case internal with the United Nations Administrative

Tribunal. As a matter of fact, there is a lawsuit in the United Stated Supreme Court today, your Honor, naming Mr. Gomez as a defendant. Now, Mr. Gomez with a title of Assistant Secretary General has absolute immunity, as opposing counselstated, then Mr. Gomez would be immune internally, externally or otherwise.

Your Honors, Mr. Gomez, and the defendants in this case are administrators who have acted in transactions outside the scope of their employment as individuals, and not as officials categorized as diplomats. As a matter of fact, United Nations employees are separate and distinct form employees designated by a foreign government to represent them in or to the United Nations Headquarters as cited in cases of U.S. v. Melleck (phonetic).

Furthermore, in the Headquarters Agreement, Paragraph 22, Section 287 under

its provision, diplomatic immunity was extended to four principal categories. United Nations employees do not fall under the four categories. The exception is one paragraph that says "persons designated in the Untied Nations charter." However, in this respect, your Honors, the opposing counsel has misled the Court below.

According to Conventions and Privileges and Immunity, Article 5, Section 17, the Secretary General must submit to the General Assembly a list categorizing officials who shall have diplomatic immunity.

Defense counsel has presented to the Court below an affidavit stating that the defendants are all officials. However, the affidavit does not affirm that the officials named within are, in fact, the officials that the Secretary General had submitted back in 1988 during the time of

this controversy as being officials and having diplomatic immunity.

As a matter of fact, Mr. Gizzoli at the time of this controversy was not an official, was not an administrator but was simply a finance officer under the professional category.

In conclusion, your Honors, we have defendants that overstepped the bounds of their employment by totally disregarding rules and regulations of the United Nations, the International Bill of Human Rights, and the agreement between the United States and the United Nations.

And, your Honors, to affirm the judgment of the Court below will give every employee of the International organization immunity form legal process as this case is a first impression related to the documents that were overlooked or not considered, and the fact that I was denied an internal due

process to tribunal.

Accordingly, I respectfully request that the judgment of the Court below be reversed and remanded for further proceedings in accordance with this decision.

Thank you, your Honors.

JUDGE ALTIMARI: We'll hear from your adversary.

MR. SSEKANDI: May it please the Court, my name is Francis Ssekandi.

JUDGE ALTIMARI: You must keep your voice up.

MR. SSEKANDI: Thank you, your Honors. I'd like to thank the Court for giving time the opportunity to appear before your Honors by admitting me to practice before this Court.

My colleague Alan Gordon and myself represents the United Nations. We also represent the eight defendants who are

named in the complaint. The appearance before the Court below and before this court is limited solely to asserting the immunities of the United Nations and those of the eight defendants.

JUDGE ALTIMARI: In what capacity are the eight defendants employed?

MR. SSEKANDI: The eight defendants were all officials of the United Nations. This is consistent with Section 18 of the Convention and Privileges and Immunities which provides that such official shall be immune from legal process.

JUDGE ALTIMARI: Is there anyone employed by United Nations who is quote, not an official?

MR. SSEKANDI: Apart -- I assume you're referring to any other person other than the eight defendants, your Honor?

JUDGE ALTIMARI: I'm asking if there's anyone other than, you know -- are the

custodians officials of the United Nations?

MR. SSEKANDI: We have a resolution of the General Assembly which has been referred to by Mr. Deluca, and this resolution, 761, does state that for purposes of the Convention officials shall be staff members of the United Nations. A staff member is appointed under the regulations adopted by the General Assembly, and anyone who is appointed under the staff regulations and rules is referred to as a staff member, therefore, an official.

However, we do have other categories of employment, people who are as casual laborers who come to provide temporary services, and who --

JUDGE ALTIMARI: Who are not officials?

MR. SSEKANDI: Who are not staff members, and , therefore, not officials.

JUDGE ALTIMARI: All right. What -- the plaintiff, what position did he hold, as an official?

MR. SSEKANDI: Mr. Deluca was employed as a security guard, and, therefore he was a staff member and an official in the United Nations.

JUDGE ALTIMARI: He was an official of the United Nations?

MR. SSEKANDI: Yes. Because he was a staff member.

JUDGE ALTIMARI: A member of the security force is an official of the Untied Nations?

MR. SSEKANDI: Yes. Yes, your Honor. I'm sorry.

In that respect, your Honor, the reference to Ms. Mills and Mr. Gizzoli who are U.S. citizens is rather misleading. There is no distinction in the Convention as between citizens of the United States or

people who are local to the duty station who the United Nations has established and those who are not. If you're appointed as a staff member, it is irrespective of race or gender. You're a staff member and you're and official.

The category of hourly rates, I think, is generally understood. I mean these are people who are casual laborers and are probably paid not a regular salary.

JUDGE ALTIMARI: How does one like Mr. Deluca air his grievance if, indeed, he has one?

MR. SSEKANDI: Mr. Deluca as a staff member of the United nations is entitled to a complete Internal Administration of Justice System which has been established by the General Assembly and the regulations adopted in accordance with the charter.

JUDGE ALTIMARI: Did he exercise his

right or privilege at any time?

MR. SSEKANDI: He has never exercised his rights.

JUDGE ALTIMARI: Was he informed that he has a right to do so as an official of the United Nations?

MR. SSEKANDI: Upon appointment every staff member is given the staff regulations and rules. He was in the United Nations for quite a long time. He knew that he had these rights. I mentioned this in the Court below that he still has the opportunity to file his case before the joint appellate board which advised --

JUDGE ALTIMARI: Does he still have that privilege now or is their a statue of limitation of some sort?

MR. SSEKANDI: There is obviously a limitation which would apply to anyone who does not raise his complaint within twelve months from the time the complaint arose.

JUDGE ALTIMARI: And you say you informed him of this right within the window of opportunity?

MR. SSEKANDI: At the time we argued this case in the District Court below, I was aware that the time had already passed for this complaint to be filed.

JUDGE ALTIMARI: And that's when you advised him?

MR. SSEKANDI: But I did offer, and I was prepared to indicate --

JUDGE ALTIMARI: Extend the statue of limitations?

MR.SSEKANDI: Sorry?

JUDGE ALTIMARI: Extend the period?

MR. SSEKANDI: Yes, We were pre --

JUDGE ALTIMARI: Are you still willing to extend that period?

MR. SSEKANDI: Your Honors, for purposes of assuring that justice is done, we are prepared to allow Deluca to file his

complaint in the UN Administration of Justice System, even today.

JUDGE ALTIMARI: And you will not impose this bar?

MR. SSEKANDI: We will not assert the time limits.

JUDGE ALTIMARI: At the conclusion of this argument, we'll hear all sides. You ar all directed to see Frank Scardilli.

Have you seen him already? Have you been before the Camp -- all right. I'll give you further instruction at the conclusion of the argument.

Do you know what I'm talking about?

MS. YEOH: No. (Inaudible) Mr. Deluca is pro se.

JUDGE ALTIMARI: I see. Well, I'm going to direct that there be one.

Go ahead.

MR. SSEKANDI: Your Honors, the arguments in favor of the immunity of the

United Nations and of the eight defendants have been amply stated in our brief. I wouldn't like to take too much of our time. I would request that the Court -- the judgment of Judge Knapp in the District Court be affirmed on the grounds that the United Nations is immune and is absolutely immune from any legal process.

JUDGE ALTIMARI: All right.

MR. SSEKANDI: That the defendants are also immune from process.

JUDGE ALTIMARI: We'll hear form Deborah Yeoh.

MS. YEOH: May it please the Court, I am Deborah Yeoh, an Assistant United Stated Attorney for the Souther District of New York representing the Untied States.

The United States has appeared in this action as an amicus curie to present the United States' interpretation of the governing treaty obligations in this case.

The United States concurs in the statements of law made by the United Nation counsel regarding the immunity of the United Nations and the individual defendants under the United Nations Convention and the International Organization's Immunities Act.

I would note very briefly that your Honor had questioned whether all of the individual defendants in this case were officials.

JUDGE ALTIMARI: Yes.

MS. YEOH: And in addition -- putting aside that fact whether or not they are officials, Mr. Ssekandi has indicated the affirmative. The International Organization's Immunities Act, which is at 22 U.S.C. Section 288(b) provides an independent source of immunity not only to officials but also to employees of International Organizations for the act

performed in their official capacity that fall within their official functions.

JUDGE ALTIMARI: So that every one in any manner, shape or form associated with the United Nations is covered by this immunity you claim?

MS. YEOH: If they are performing acts within their official capacity and within their official functions.

JUDGE ALTIMARI: So then take the most level entry position at the United Nations, whatever that may be, if that person is doing whatever is called for in that job description that person is covered by that immunity?

MS. YEOH: Yes, your Honor.

JUDGE ALTIMARI: And that section is?

MS. YEOH: It's 22 U.S.C. Section 288D(b).

JUDGE ALTIMARI: And are there any citations for that go along with this

authority? Are there any cases saying what you just said?

MS. YEOH: I don't believe that I cited any cases that say a very low level employee would be covered, but the statute, I believe, is clear on its face.

JUDGE ALTIMARI: You think a clear reading of the 22 U.S.C. 288D indicates that anyone fulfilling, performing his or her duties is covered by the immunity that you mentioned?

MS. YEOH: The immunity --

JUDGE ALTIMARI: Is that your position? I just want to know what your position is. Is that your position.

MS. YEOH: Yes, your Honor.

Excuse me, your Honor. The Boyma case at 664 F. Supp.

JUDGE ALTIMARI: 644 --

MS. YEOH: F. Supp. at 72.

JUDGE ALTIMARI: I'm sorry. What, 72?

MS. YEOH: At 72.

JUDGE ALTIMARI: At Page 72?

MS. YEOH: Yes.

JUDGE ALTIMARI: Good.

MS. YEOH: If the Court has no further questions, the government will rest on its brief.

JUDGE ALTIMARI: Very good. All right Now, you're all directed -- listen carefully now -- to go to see Mr. Scardilli. The limited purpose for the meeting before him is to determine whether or not Mr. Deluca will consent to withdraw this matter on the representation that he may pursue whatever rights he may have in this administrative proceeding that has been outlined to the Court just a moment ago by -- I can't pronounce your name.

MR SSEKANDI: Mr. Ssekandi.

JUDGE ALTIMARI: Counsel for the UN is close enough. All right.

Okay. Do you understand that?

MS. YEOH: Yes, Your Honor.

JUDGE ALTIMARI: In the interim, this decision is reserved. You will contact the Court by letter through the clerk's office indicating that, yes, the appeal has been withdrawn on the representation by the United Nations that they will not present a bar of the statute of limitations a it related to Mr. Deluca's claim. All you will merely say that there has been no agreement and the matter is submitted to the Court completely for adjudication. Do you understand that?

MR. SSEKANDI: Yes.

JUDGE ALTIMARI: Very good.

U.S. Department of Justice

United States Attorney

Southern District of New York

100 Church Street
New York, New York 10007

October 13, 1993

BY HAND

Honorable Whitman Knapp
United State District Judge
United States District Court
Foley Square
New York, New York 10007

Re: DeLuca v. United Nations
93 Civ. 2021 (WK)

Dear Judge Knapp:

Enclosed please find a courtesy copy of a statement of interest on behalf of the United States discussing the immune status of the United Nations, and the United Nations officials named in this action. The United States joins with the United Nations in requesting that the court dismiss the case for lack of subject matter jurisdiction.

Respectfully,

MARY JO WHITE
United States Attorney

By: /s/_____
RICHARD W. MARK
Chief, Civil Division

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Department of the Treasury
Internal Revenue Service
HOLTSVILLE, NY 00501

Date of this notice AUG. 29, 1988
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Form: 1040ES Tax Period: 1988

MAURIZIO & JANE DELUCA
152 LEVERETT AVE.
STATEN ISLAND NY 10308-1644

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